

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 1, 2002 Session

RUTHERFORD B. QUINN v. TINA ILENE QUINN

**Appeal from the Chancery Court for Montgomery County
No. 96-09-0008 Carol Catalano, Chancellor**

No. M2001-01118-COA-R3-CV - Filed September 17, 2002

Mother and Father divorced pursuant to a Marital Dissolution Agreement (“MDA”) in 1996. Under the MDA, Mother had physical custody of the child during the school year. In the Fall of 1999, Mother moved to Alabama with the child. Father filed a petition for contempt and change of custody. The trial court held that Mother’s move was a material change in circumstances and that Father would receive primary custody of the child. Mother appealed. Taking into account the provisions of the Relocation Statute, Tenn. Code Ann. § 36-6-108, we vacate the trial court’s decision and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Vacated and Remanded**

BEN H. CANTRELL, P.J., M.S., delivered the opinion of the court, in which WILLIAM C. KOCH, JR. and PATRICIA J. COTTRELL, J.J., joined.

Carrie Kersh, Clarksville, Tennessee, for the appellant, Tina Ilene Quinn.

Sharon Massey, Clarksville, Tennessee, for the appellee, Rutherford B. Quinn.

OPINION

I.

Mother and Father were married on October 17, 1992. They divorced on December 6, 1996, and the court adopted their Marital Dissolution Agreement (“MDA”). According to the MDA, the initial custody provisions for their three-year-old daughter called for each parent to have physical custody for six months each year. When the child began school, Father would have custody of their minor child during the school year and Mother would have custody during the summer months “until the [Mother] is no longer working at the different out of state job sites.” When she stopped working her out of state jobs, Mother would have custody during the school year and Father would have custody during the summer months.

In the Fall of 1998, the child began kindergarten and lived with Mother during the school year. She then lived with Father during the Summer of 1999. At this time, Mother went to Alabama to care for a friend who had been injured in an accident. Mother decided to move to Alabama. Without notifying Father, Mother moved to Alabama with the child in August of 1999 and enrolled her in school.

On August 19, 1999, Father filed a petition for contempt and change of custody with the trial court. The child remained with Mother in Alabama until the trial court heard the matter on January 23, 2001. In an order filed February 16, 2001, the trial court found:

C. That a material change of circumstances exists, as the parties agreed as part of the Marital Dissolution Agreement to raise this child equally, and the original agreement, incorporated into a Final Decree, gave each party six (6) months at a time with the minor child, and the last sentence of Section V, Paragraph One, stated, "The parties will not pay child support to each as each party will have equal time and responsibility with and for the minor child." Section V also provided for the care of the child when the mother was out of state working, and allowed for the child to remain with the Husband during those years.

D. That the mother moved to Alabama, without complying with the relocation statute, and she admits that fact both in her Answer and in open court. The purpose for which she left the state has been served and her choice to remain in Alabama after that purpose was served is the material change in circumstances warranting a modification of the visitation arrangement due to the impossibility of visitation, especially the weekends and Wednesdays.

E. That the Proposed Permanent Parenting Plan of the father reflects the original intention of the parties and is more parallel to the parties own Marital Dissolution Agreement executed in 1996, and this Court has no reason not to continue the original intention of the parties to spend equal time with the minor child.

F. The Court is adopting the father's parenting plan, and the petition for contempt is dismissed against the mother. There is to be no child support paid by either party, as was the original intention, and the child shall continue to receive the Social Security Disability.

G. This transfer of residence shall begin at the end of the child's spring break from 2000-2001 school this year.

Father's Proposed Permanent Parenting Plan, adopted by the court, included several residential provisions: (1) Father would have primary custody of the child; (2) Mother would have visitation every other "weekend[]" when she provides seven (7) days notice of intent to visit, at least one weekend per month, if she chooses;" (3) the child shall spend every spring break with Mother;

(4) the child shall spend the summer with Mother; and (5) “[w]hen the child is out of school for mid term breaks, the parent not having primary residential care has the right of first refusal to have visitation and at any weekend with seven (7) days notice to the other party.”

II.

TENN. CODE ANN. § 36-6-108

The proper procedure concerning a parent’s move out of the jurisdiction can be found in Tenn. Code Ann. § 36-6-108. Tenn. Code Ann. § 36-6-108 is known as the “Parent Relocation Statute” and lays out procedures for divorced parents when one wishes to relocate. Under Subsection (a), the moving parent is required to give the other parent sixty (60) days notice by mail. Mother admits that she did not comply with this requirement. Father, however, learned of the move and filed his petition for contempt and change of custody on August 19, 1999, bringing into play the relocation statute.

The pertinent provisions of that statute are:

(c) If the parents are actually spending substantially equal intervals of time with the child and the relocating parent seeks to move with the child, the other parent may, within thirty (30) days of receipt of notice, file a petition in opposition to removal of the child. No presumption in favor of or against the request to relocate with the child shall arise. The court shall determine whether or not to permit relocation of the child based upon the best interests of the child. The court shall consider all relevant factors including the following where applicable:

. . . .

(d) If the parents are not actually spending substantially equal intervals of time with the child and the parent spending the greater amount of time with the child proposes to relocate with the child, the other parent may, within thirty (30) days of receipt of the notice, file a petition in opposition to removal of the child. The other parent may not attempt to relocate with the child unless expressly authorized to do so by the court pursuant to a change of custody or primary custodial responsibility. The parent spending the greater amount of time with the child shall be permitted to relocate with the child unless the court finds:

- (1) The relocation does not have a reasonable purpose;
- (2) The relocation would pose a threat of specific and serious harm to the child which outweighs the threat of harm to the child of a change of custody; or
- (3) The parent’s motive for relocating with the child is vindictive in that it is intended to defeat or deter visitation rights of the non-custodial parent or the parent spending less time with the child.

. . . .

(e) If the court finds one (1) or more of the grounds designated in subsection (d), the court shall determine whether or not to permit relocation of the child based on the best interest of the child. If the court finds it is not in the best interests of the child to relocate as defined herein, but the parent with whom the child resides the majority of the time elects to relocate, the court shall make a custody determination and shall consider all relevant factors including the following where applicable:

- (1) The extent to which visitation rights have been allowed and exercised;
- (2) Whether the primary residential parent, once out of the jurisdiction, is likely to comply with any new visitation arrangement;
- (3) The love, affection and emotional ties existing between the parents and child;
- (4) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;
- (5) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;
- (6) The stability of the family unit of the parents;
- (7) The mental and physical health of the parents;
- (8) The home, school and community record of the child;
- (9) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;
- (10) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; and
- (11) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child.

Tenn. Code Ann. § 36-6-108 (c), (d) & (e).

Under these statutes, the trial court is required to determine whether the parents have equal time with the child or not (subsection (c)). If so, the trial court should then conduct a best interest analysis to determine whether to allow relocation. If the trial court determines that the parents do not have equal time with the child, then the trial court should allow the relocation unless one of three conditions are met (subsection (d)). If the trial court finds one of these three conditions, the trial court must then move to a best interest analysis (subsection (e)). If, standing alone, it is not in the best interest of the child to move despite a finding of one of the subsection (d) factors, then the court must make a fresh custody determination using the factors in subsection (e).

III.

The record shows that the parties were not spending substantially equal intervals of time with the child. Mother had primary custody during the school year. That fact required the court to move to subsection (d) and the court did find that the relocation did not have a reasonable purpose. If it was not in the best interest of the child to relocate, then the court should have considered changing custody, basing its analysis on the factors in subsection (e). This is the step that the trial court left out.

The trial court was primarily concerned with whether a change of circumstances had occurred. Under this statute that question does not arise. The legislature probably assumed that an attempt by the custodial parent to relocate to a point more than 100 miles away was in itself a change of circumstances. But passing on to the merits, the only findings in the record that relate to the best interests of the child are:

The intent of the legislature – I wish I had the act here because I would like for both of those parents to hear what the legislature said in its preamble to that act about what children need, what the child needs, but I don’t have it. And I don’t think that the child needs to be traveling any 10,800 miles per year.

From the preamble, the Court understands that the proper perspective for determining who gets what share of the child’s time, the perspective is what’s for the child’s best interest, what would work best for the child, regardless of whether it works best for mom or dad or either or both. And it’s the Court’s opinion, comparing these two shared parenting plans, that the father’s shared pertaining [sic] plan is for the best interest of the child.

What’s more, the Court finds that the father’s shared parenting plan more parallels – and I think that’s the bottom line here – the father’s shared parenting plan more parallels the parties’ own marital dissolution agreement executed in 1996. And the Court has no reason not to continue that intention of these two parties to give each other equal time and responsibility with and for the minor child.

This is the extent of the trial court’s best interest analysis. The trial court merely mentions the distance involved when transporting the child and then relies upon the fact that Father’s parenting plan more accurately reflects the original intention of the parties. Even if all other factors (of which there are many, *see* Tenn. Code Ann. § 36-6-106 and Tenn. Code Ann. § 36-6-108(c)) were equal, we would hesitate to say based on these facts, that the best interests of the child would defeat the mother’s desire to relocate. But the analysis requires another step: consider changing custody based on the factors in Tenn. Code Ann. § 36-6-108(e). We find no evidence in the record that the court went through this step.

We acknowledge that the Relocation Statute creates what looks like a maze, requiring the court to dart in and out of dark passages, looking for best interests, motives, and other custody factors. Under subsection (e), even after the court finds that it is not in the best interest of the child to relocate, the court may nevertheless allow it by deciding to leave custody with the relocating parent.

We therefore vacate the lower court's order changing custody, and we remand the cause to the trial court for a fresh determination of the issues using the statutory scheme. The custody of the child shall remain according to the lower court's order until a subsequent order is entered. Tax the costs on appeal to the father.

BEN H. CANTRELL, PRESIDING JUDGE, M.S.